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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1951.

No. 179.

OSTERMAN & HUTNER, GOLDMAN, SACHS & CO., GRAHAM-NEWMAN CORPORATION, NEWMAN & GRAHAM, AND ABRAHAM & CO.,
Petitioners,

against

GUARANTY TRUST COMPANY OF NEW YORK, as Trustee under the First Consolidated Mortgage Deed of The Rio Grande Western Railway Company, dated April 1, 1899, JULIUS KLORFEIN, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee under the Refunding and Improvement Mortgage of The Denver and Rio Grande Western Railroad Company, dated February 1, 1924, CITY BANK FARMERS TRUST COMPANY, as Trustee under The Denver and Rio Grande Western Railroad Company's General Mortgage, dated February 1, 1924, The Denver and Rio Grande Western Railroad Company, and Harold S. Baird,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT FOR THE FIRST DEPARTMENT OF THE STATE OF NEW YORK.

BRIEF FOR RESPONDENT THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, AS TRUSTEE UNDER THE REFUNDING AND IMPROVEMENT MORTGAGE OF THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DATED FEBRUARY 1, 1924, IN OPPOSITION.

ARTHUR A. GAMMELL,
Attorney for Respondent The Chase National Bank of the City of New York, as Trustee.

August 10, 1951.

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Statement.

This Court, in approving the plan for the reorganization under Section 77 of The Denver and Rio Grande Western Railroad Company, in effect decided that, since the Utah Fuel Company stock was accommodation collateral not part of "the debtor's estate", the question of the rights of the

parties in respect of said stock should be decided in "an independent suit in which there is jurisdiction over the proper parties." *R. F. C.* v. *Denver & R. G. W. R. Co.*, 328 U. S. 495, 531 (1946), n. 33.

In the "independent suit", the Supreme Court of the State of New York determined and foreclosed the liens on the Utah Fuel Company stock (R. 135-164), and, among other things, granted allowances to the respondents for services in connection with said suit to be paid out of the proceeds of the foreclosure sale of said stock (R. 12-15).

The petition seeks to review the order of the Appellate Division of the Supreme Court of the First Department of the State of New York (R. 197-199) affirming the order of the Supreme Court of the State of New York (R. 12-15) granting said allowances.

The petitioners believe that the Supreme Court of the State of New York lacked jurisdiction to grant these allowances out of these funds.

The petitioners are holders of bonds for which the respondent The Chase National Bank of the City of New York is trustee.

Said Chase National Bank as trustee believes that the granting of these allowances payable out of said proceeds was in all respects lawful and proper.

Paragraph (12) of subsection (c) of Section 77 (11 U. S. C. § 205(c)(12)) permits the judge to make allowances within limits fixed by the Interstate Commerce Commission "to be paid out of the debtor's estate". The allowances granted in this "independent suit" were not "to be paid out of the debtor's estate".

The language in the order of the reorganization court (R. 68) (the so-called Consummation Decree of the District Court in Colorado) providing for the payment of the compensation and expenses of the three respondents Mortgage trustees and their attorneys in connection with the Utah Fuel Company stock foreclosure action, merely created, it is believed, an alternative source of payment in case proceeds of the Utah Fuel Company stock were not available for the purpose.

In view of the difference of opinion, said Chase National Bank as trustee welcomed the submission of the question to the court.

The Supreme Court of the State of New York decided (R. 185-188) that the granting of these allowances payable out of said proceeds was in all respects lawful and proper; the decision was unanimously affirmed by the Appellate Division (R. 197-199); and a motion for leave to appeal was denied by the Court of Appeals.

This brief is addressed only to the argument that Section 77 or the authorities cited by the petitioners or the so-called Consummation Decree deprives the New York court of jurisdiction to grant the allowances.

ARGUMENT.

Nothing in Section 77 or in the Authorities Cited or in the so-called Consummation Decree Deprives the New York Court of Jurisdiction to Grant the Allowances.

The petitioners rely on *Brown* v. *Gerdes,* 321 U. S. 178 (1944), affirming 290 N. Y. 468, and *Leiman* v. *Guttman,* 336 U. S. 1 (1949), affirming 297 N. Y. 201.

Both these cases dealt with reorganizations under Chapter X of the Bankruptcy Act.

The Denver and Rio Grande Western Railroad Company was reorganized under Section 77 of the Bankruptcy Act.

The provisions of Chapter X as to allowances relate in general to all allowances in respect of services in connection with the reorganization.

Paragraph (4) of Section 221 (11 U. S. C. § 621 (4)) of Chapter X requires the judge as a condition precedent to approving the plan to be satisfied as to

> "* * * all payments made or promised by the debtor or by a corporation issuing securities or acquiring property under the plan *or by any other person,*

> for services and for costs and expenses in, or in connection with, the proceeding or in connection with the plan and incident to the reorganization, * * *." (Emphasis supplied.)

The provisions of Section 77 as to allowances, on the other hand, are in terms limited and relate only to allowances "paid out of the debtor's estate".

Paragraph (12) of subsection (c) of Section 77 (11 U. S. C. § 205(c)(12)) permits the judge to make allowances within limits fixed by the Interstate Commerce Commission "to be paid out of the debtor's estate".

The allowances to which the petitioners object were directed to be paid not "out of the debtor's estate"—but out of the proceeds of accommodation collateral which was no part of the debtor's estate.

The petitioners also rely on *New York Trust Co.* v. *New York & Greenwood Lake Ry. Co.,* 156 F. 2d 701 (C. C. A. 3d, 1946), which dealt with a reorganization of the Erie Railroad Company under Section 77. The decision was in effect that the property covered by the mortgage to the New York Trust Company as trustee was part of the estate of the Erie Railroad Company.

The petitioners further rely on the language in the Decree of the District Court in Colorado (the so-called Consummation Decree).

The Consummation Decree in paragraph 19 (R. 66-68) directs the reorganized Railroad Company to pay the compensation and expenses of the three Mortgage trustees and their attorneys in connection with the "independent suit"—the Utah Fuel Company stock foreclosure action.

But this Decree (R. 58-77) provides that it "neither affects nor purports to affect" the "lien" of any of the three Mortgages, and further provides that

> "* * * with respect to said stock of the Utah Fuel company and the rights and interest therein of the trustees under said mortgages * * *, the aforesaid mortgages are not satisfied, cancelled, and re-

leased by this order but remain in full force and effect." (R. 64-66).

Each of the three Mortgages created a lien on the Utah Fuel Company stock for the payment of the compensation and expenses of the Mortgage trustee and its attorneys. Since the Decree expressly states that it "neither affects nor purports to affect" the liens of any of the three Mortgages and that these liens "remain in full force and effect", the purpose of the Decree could not have been to prevent the enforcement of any of these liens in the "independent suit".

The general language (in paragraph (50)) (R. 77) reserving jurisdiction as to the making of allowances and as to the other matters therein mentioned is no more than the customary language in such decrees expressly keeping alive in case of need jurisdiction as to unfinished matters. Neither this language nor any other language in the Decree is capable of being interpreted as enjoining or prohibiting the enforcement of the liens on the Utah Fuel Company stock for compensation and expenses, or is in any way inconsistent with the express provision quoted above that the liens are not affected but "remain in full force and effect."

Furthermore, the District Court in Colorado had jurisdiction only over the properties of the Railroad Company being reorganized. It had no jurisdiction over the Utah Fuel Company stock. Accordingly, the District Court in Colorado lacked power to exercise jurisdiction to prevent the Court below from enforcing the lien on the Utah Fuel Company stock for allowances according to its terms. As stated by Judge PECORA in the opinion rendered February 16, 1949, determining and foreclosing the liens,

> "The reorganization occurred in the Federal bankruptcy court, and, as is not disputed in this case, concerned only the property of the debtor railroad. That was all that the courts passing on the reorganization had jurisdiction to deal with * * *. Accordingly, the 100,000 shares of the capital stock of the Utah

> Fuel Company, which were not the property of the debtor railroad, were not really involved in that litigation, and their disposition was not even attempted in the reorganization litigation. * * *
>
> "The Utah Fuel Company stock is not the property of the Denver and Rio Grande Western Railroad either as that corporation was before reorganization or as it is now. * * *" *Guaranty Trust Co.* v. *Chase National Bank,* 194 Misc. 628, 630-631 (1949), aff'd 277 App. Div. 767 (1st dept., 1950).

The purpose of the Decree which suggests itself is to prevent any of the three Mortgage trustees or their attorneys from having no source from which to be paid their compensation and reimbursed their expenses in connection with the Utah Fuel Company stock foreclosure action.

The Decree of course required, as a necessary step in the reorganization, the cancellation of the three Mortgages on the railroad properties being reorganized—that is, the properties other than the Utah Fuel Company stock. This cancellation of the liens on the mortgaged properties other than the Utah Fuel Company stock created the possibility of the retained liens on the Utah Fuel Company stock not being sufficient to assure to each trustee a source from which the allowance would be paid. When the Decree was signed no one could tell how the Utah Fuel Company stock foreclosure action would turn out. If, for example, the stock had sold for so small a price that there would have been no excess against which to enforce the lien of the Mortgage under which the Chase National Bank is trustee, neither the trustee nor its attorneys could have been paid except as provided in the Decree. The purpose suggests itself merely to require the payment of the allowances by the reorganized Railroad Company in case the lien turned out to be ineffectual.

CONCLUSION.

The petition should be denied.

Respectfully submitted,

ARTHUR A. GAMMELL,
Attorney for Respondent The Chase National Bank of the City of New York, as Trustee.

August 10, 1951.